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IN THE SUPREME COURT
STATE OF ARIZONA

IN THE MATTER OF: PETITON TO AMEND ER 8.4, RULE 42, ARIZONA RULES OF THE SUPREME COURT	Supreme Court No. R-10-0031 **Concerned Attorneys' Comment to Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court**

Fifty-two concerned attorneys hereby comment regarding the Petition to Amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court. The State Bar of Arizona has petitioned this Court to amend ER 8.4, Rule 42, Arizona Rules of the Supreme Court, by adding the following language: "It is professional misconduct for a lawyer to knowingly manifest bias or prejudice based upon race, gender, religion, national origin, disability, age, sexual orientation, gender identity or expression, or socioeconomic status in the course of representing a client when such actions are prejudicial to the administration of justice; provided, however, this does not preclude legitimate advocacy when such classification is an issue in the proceeding."

[1] Firm information is provided for identity only; the concerned attorneys assert their position on their own behalf and not on behalf of any organization with which they may be affiliated.

For the reasons set forth below, the concerned attorneys oppose this proposed revision, particularly the inclusion of sexual orientation and gender identity or expression. We believe, as explained herein, that the proposed provision is unnecessary, ambiguous, and unconstitutional. Our concern, most particularly, is that the proposed provision violates due-process, free-speech, and free-exercise guarantees.

In 2008, the State Bar considered a similar change to the Arizona Bar Oath of Admission, which would have required all attorneys to affirm that they would not permit considerations of "gender, race, religion, age, nationality, sexual orientation, disability, or social standing" to influence their work. Many of the undersigned attorneys submitted a letter to the State Bar objecting to that proposal. After the State Bar considered our and others' objections, it decided not to submit the prior proposal to this Court, thereby demonstrating that the State Bar found that proposal unacceptable.

We first learned of the now-pending petition, which mimics the effect of the prior, unacceptable effort to amend the oath, through media coverage on July 11, 2011. It does not appear that the proposed change was widely publicized prior to that date. While the State Bar briefly referenced this proposal in a few of its earlier publications, those materials provided only abstract and incomplete descriptions of its plans. This is not to say that the Bar intentionally obscured the petition's content, but instead we seek to explain why we have not commented earlier. We respectfully request the Court consider this comment in its deliberation regarding the proposed rule change.

Before discussing the legal and policy concerns associated with the proposed provision, we begin by determining the contours of its application. Then, having considered the provision's scope, we highlight our legal and policy

concerns. Notably, many of our concerns extend not only to the pending petition, but also call into question the validity of the existing Comment 3 to ER 8.4, Rule 42, which appears to regulate discrimination on the basis of sexual orientation and gender identity. At best, the petition is therefore superfluous—and further, some of the concerned attorneys are now considering whether to propose an amendment to resolve extant concerns with Comment 3.

The Proposed Provision Applies to Attorney Expression and Attorney Autonomy over Client Choices.

The proposed provision applies with particular force to attorney expression, for it prohibits what an attorney "manifest[s]," and its application to protected speech is rather broad because it reaches attorney manifestations "in the course of representing a client." This, of course, encompasses most of an attorney's professional expression since lawyers are in the business of representing clients.

Other features of the provision fail to narrow its scope sufficiently to protect attorneys' free-speech rights. The terms "bias" and "prejudice" and the phrase "prejudicial to the administration of justice" do not confine its reach in a constitutionally appropriate manner. When targeting an attorney's manifestations and expression, such terms are hopelessly vague. Lawyers, after all, are paid to manifest bias and prejudice in favor of their clients, their clients' causes, and their clients' rights; what one person might call "bias" and contrary to the "administration of justice," another observer might just as well consider good advocacy. Nor does the "legitimate advocacy" exemption provide adequate protection for attorney expression because it is confined only to instances involving a particular "proceeding." Attorneys often advocate for clients outside the context of proceedings: corporate counsel and transactional attorneys, for instance, devote nearly all their time to representing their clients in tasks unconnected with any proceeding; and even litigating or public-interest attorneys

perform countless non-proceeding-related tasks for their clients, such as expressing their clients' interests to legislatures, governmental agencies, the media, or the public.

The proposed provision also impacts attorney autonomy over client choices. While it targets manifestations that occur "in the course of representing a client," that phraseology does not explicitly exempt an attorney's client-selection decisions (for the provision does not specify when exactly in the "course" of representation the prohibited manifestation must occur); nor does it exempt a lawyer's decision to discontinue client representation (for such decisions necessarily occur in the course of representing a client). A few examples sharpen this point.

Suppose that an attorney agrees to represent a client in his bankruptcy proceedings, and that later, after the attorney-client relationship commences, the client receives a marriage license from the State of Massachusetts for him and his same-sex partner, and that the client wants to argue that the bankruptcy court should strike down the federal Defense of Marriage Act and recognize that union. If the attorney, due to his sincerely held religious beliefs, decided that he could no longer represent the client in light of this new development, the proposed provision would seemingly prevent him from discontinuing the representation because his decision might be deemed to "manifest bias . . . based upon . . . sexual orientation."

Similarly, consider a criminal-defense attorney who agrees to defend a client, who the attorney believes to be a woman, charged with lewd conduct in the women's restroom, but later the client informs the attorney that he is in fact a man who dresses as a woman and uses women's restrooms. The attorney, notwithstanding his sincerely held religious or moral objections to the client's

behavior, could not discontinue his representation under the proposed provision because one might conclude that the attorney's decision "manifest[ed] bias . . . based upon . . . gender identity or expression." Thus, the provision significantly jeopardizes attorney autonomy over client selection and retention decisions.

The Proposed Provision Is Unconstitutionally Vague.

An ethical requirement that "either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law." *Cramp v. Bd. of Pub. Instruction of Orange County, Fla*, 368 U.S. 278, 287 (1961). As discussed above, the proposed provision is full of vague terms ("bias" and "prejudice")[2] that target attorney expression ("manifest[ations]"). For this reason, trained attorneys are left to speculate about its meaning and application. Adopting such a vague provision—one which exposes attorneys to discipline—violates due-process principles of the federal constitution.

These vagueness concerns also infringe upon the free-speech rights of attorneys. "First Amendment freedoms need breathing space to survive." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 604 (1967). The "vice of vagueness" is that an attorney cannot know what conduct is proscribed. *See Elfbrandt v. Russell*, 384 U.S. 11, 15 (1966). Uncertain meanings require the attorney "to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964) (quotation and citations omitted); *see also Keyishian*, 385 U.S. at 604. Such ambiguity creates a chilling effect on the exercise of First Amendment

[2] Vagueness also exists in the phrases "gender identity or expression" and "sexual orientation." We discuss below the novel and unsettled nature of these concepts and terms.

freedoms. *See id.* Thus, adopting the vague proposed provision violates free-expression principles of the federal constitution.

The Proposed Provision Unconstitutionally Compels Speech.

"[O]ne important manifestation of the principle of free speech is that one who chooses to speak may also decide what not to say." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 U.S. 557, 573 (1995) (quotations omitted). This bedrock constitutional principle undergirds the well-established rule against compelled expression, which prohibits the government from compelling a private actor, including an attorney, to express or affirm a message contrary to his beliefs. *See Johanns v. Livestock Mktg. Ass'n*, 544 U.S. 550, 557 (2005) (identifying compelled-speech cases as those where "an individual is obliged personally to express a message he disagrees with, imposed by the government"); *United States v. United Foods, Inc.*, 533 U.S. 405, 410 (2001) (recognizing that the First Amendment "prevent[s] the government from compelling individuals to express certain views"). The "choice of a speaker not to propound a particular point of view . . . is presumed to lie beyond the government's power to control," *Hurley*, 515 U.S. at 575, and the government may not "compromise" or otherwise invade "the speaker's right to autonomy over the message," *id.* at 576.

The proposed provision violates this constitutional guarantee against compelled speech. It may be read to compel an attorney to represent or continue representing a client even if advocating that client's position or interests would conflict with the attorney's sincerely held religious or moral convictions. Because lawyers exercise many expressive rights when representing their clients—indeed, the advocacy process is rife with expression (speaking, writing, and arguing, to name a few, *see Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071-73

(1991))—the proposed provision essentially forces attorneys to advocate unwanted positions or causes, and the federal constitution flatly prohibits that result.

The Proposed Provision Unconstitutionally Prohibits Protected Speech.

The proposed provision threatens to prohibit attorneys from advocating politically controversial views on behalf of their clients in all contexts unrelated to a proceeding. These hot-button views include, among others, that the law should continue to define marriage only as the union of one man and one woman (which might be said to "manifest bias . . . based upon . . . sexual orientation"), and that the law should continue to embrace its understanding of male and female as determined by biology and anatomy rather than the subjective internal feelings associated with the "gender identity or expression" construct (which might be said to "manifest bias . . . based upon . . . gender identity or expression"). "The Constitution does not permit the Government to confine [clients] and their attorneys" by excluding ostracized yet vital "theories and ideas." *Cf. Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (dealing only with the litigation context). That, however, is precisely what the proposed provision threatens to do.

This silencing of attorney advocacy for publicly marginalized views runs directly counter to the purpose of the First Amendment. By branding these views as "discriminatory" and a form of "professional misconduct," the proposed provision encourages public and private contempt, along with official punishment, against attorneys and clients who express such views and beliefs. Undoubtedly, many of those attorneys and their clients will stop communicating such opinions for fear that they might be punished by the Bar or viewed with scorn by their colleagues. This government-induced ostracizing of unpopular views is deeply unsettling.

The Proposed Provision Unconstitutionally Discriminates on the Basis of Viewpoint.

A legal provision proscribing expression must not exhibit, either explicitly or implicitly, viewpoint discrimination. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 391 (1992). The proposed provision suffers from this constitutional flaw, and a few examples illustrate this defect.

First, suppose that an attorney writes a letter for his client (in a context unrelated to a specific proceeding) arguing that the State should give marriage licenses to same-sex couples and that failing to do so is discrimination on the basis of sexual orientation. That attorney most assuredly would not be accused of manifesting prejudice based on sexual orientation. But consider the attorney who, on his client's behalf, conveys the exact opposite position—that the State should continue defining marriage only as the union of one man and one woman. It is no stretch to think that many people would conclude that such expressions manifest prejudice based on sexual orientation.

Second, contemplate that a group begins to lobby the Arizona Legislature to add "gender identity or expression" to the State's nondiscrimination law. The attorneys who, while representing their clients, publicly advocate in favor of that proposed law certainly would not be charged with violating the proposed provision. But in contrast, the attorneys whose clients want them to oppose that legal change risk punishment under that provision for manifesting prejudice against "gender identity or expression."

In short, then, under the proposed provision, attorney advocacy that is artificially "*in favor* of . . . [so-called] tolerance and equality" concerning the enumerated categories would be unfettered, but expression by "those speakers' opponents" would be stifled. *See R.A.V.*, 505 U.S. at 391. That amounts to

viewpoint discrimination, and as the Supreme Court has recognized, the government "has no such authority to license one side of a debate to fight freestyle, while requiring the other to follow Marquis of Queensberry rules." *Id.* at 392.

The Proposed Provision Violates the Free Exercise of Religion.

The direct conflict between religious liberty and the proposed provision's inclusion of sexual orientation is plain to see. *See* Michael W. McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. 1, 43-44 (2000); *see generally Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Douglas Laycock et al., eds., 2008). Indeed, we have already referenced it in passing. On the one hand, most of the major religions in our State—such as Christianity, Judaism, Mormonism, and Islam—hold certain precepts and convictions about sexual behavior. On the other hand, the proposed provision threatens to force attorneys holding these beliefs to advocate for clients in a manner contrary to their religious tenets. This creates a direct clash between professional obligations and religious convictions.

The "Free Exercise Clause [of the First Amendment] pertain[s] if the law at issue discriminates against some or all religious beliefs." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). And following its enactment of the Free Exercise of Religion Act ("FERA"), Ariz. Rev. Stat. § 41-1493 *et seq*, Arizona offers broader religious liberties than those protected by the First Amendment. FERA declares that the "government shall not substantially burden a person's exercise of religion even if the burden results from a rule of general applicability." Ariz. Rev. Stat. § 41-1493.01(B). The requirement of a "substantial burden" is not rigorous; it is "intended solely to ensure that [FERA] is not triggered by trivial . . . infractions." Ariz. Rev. Stat. § 41-1493.01(E). The

infringement on the free-exercise rights of religiously motivated attorneys at issue here—by requiring them to advocate views and legal positions that conflict with their sincerely held religious beliefs—is far from trivial and thus violates FERA.

The State would be unable to show, as is required under FERA, that the proposed provision is "both in furtherance of a compelling governmental interest [and] the least restrictive means of furthering that compelling governmental interest." Ariz. Rev. Stat. § 41-1493.01(C). It is unclear what interest the State intends to further through the proposed provision, but it certainly does not appear to be a compelling one.

Moreover, regardless of whether the proposed provision furthers a compelling interest, the State has not used the least restrictive means to achieve its end. Other less-restrictive means (such as a religious opt-out procedure) exist in these circumstances, and the State's failure to use those alternatives dooms their actions under FERA analysis. Thus, the free-exercise rights of Arizona attorneys weigh heavily in favor of denying the State Bar's petition.

Ethical Mandates Like the Proposed Provision Have Become a Threat to People of Faith in Other Professions.

Other professions have unwisely implemented ethical obligations like the proposed provision, but experience has shown the harm such enactments inflict on professionals who hold religious convictions about sexual morality. An existing legal case demonstrates the concern: In *Ward v. Wilbanks*, Case No. 09-CV-11237, 2010 WL 3026428 (E.D. Mich. July 26, 2010), a Michigan public university dismissed a counseling student because, according to the university, her religious need to refer prospective clients seeking counseling to affirm homosexual behavior violated the counseling profession's ethical obligation against discriminating based on sexual orientation.

That case (and others like it) tangibly shows how ethical measures like the

proposed provision drive people of faith from a profession, essentially creating a religious litmus test excluding individuals who want to adhere to their religious convictions while carrying out their professional obligations. Ironically, then, the proposed provision will not promote tolerance and diversity in the law, but will senselessly force people of faith from the profession. In this way, this misguided effort to prevent "discrimination" will actually engender pernicious discrimination against professionals who hold religious convictions.

The Proposed Provision Attempts to Enshrine in the Ethical Rules Protected Classifications and Concepts Not Adopted by the Legislature.

The proposed provision, by including "sexual orientation" and "gender identity or expression," embraces controversial protected classifications and concepts that have never been approved by the Legislature and are relatively foreign to Arizona law. *See, e.g.*, Ariz. Rev. Stat. § 41-1402(A)(8) (discussing "the elimination of discrimination between persons" only "because of race, color, religion, sex, age, disability, familial status or national origin").

To begin with, sexual orientation is a controversial, vaguely defined, and unsettled concept. Even scholars who regularly study sexual orientation cannot agree on a definition for or understanding of it. *See* Todd A. Salzman & Michael G. Lawler, *The Sexual Person* 150 (2008) ("The meaning of the phrase 'sexual orientation' is complex and not universally agreed upon."). Not only is it a difficult-to-define phenomenon, but as mentioned above, creating a protected-class status based on sexual orientation produces significant conflicts with religious liberty. *See* McConnell, *The Problem of Singling Out Religion*, 50 DePaul L. Rev. at 43-44; *Same-Sex Marriage and Religious Liberty: Emerging Conflicts* (Laycock et al., eds.,). For these reasons, more than half the States have

joined Arizona in refusing to codify sexual orientation as a protected classification.

Similarly, gender identity and expression is also a fiercely debated notion. Gender identity is generally defined as "a personal conception of oneself as male or female" or "intersex." Shuvo Ghosh, *Sexuality, Gender Identity*, eMedicine (May 19, 2009), http://emedicine.medscape.com/article/917990-overview. The notion of a person's gender identity sharply contrasts with the well-established and long-recognized legal classification of a person's sex. Sex, on the one hand, is determined by a person's biology and anatomy, *id.*; it is thus clearly defined and objectively determined. Gender identity, in contrast, is determined by "one's own identification as male, female, or intersex," *id.*; it is therefore an ambiguous classification, determined by a person's subjective self-identification, and subject to unstable shifts at the whim of each person's internal feelings and perceptions. This novel concept would undoubtedly bring a sea change to our State's legal understanding of maleness and femaleness. Indeed, this concept is so foreign to our legal traditions that the vast majority of the States have joined Arizona in declining to enshrine gender identity or expression in the law.

While the Court certainly may regulate the practices of its officers, this social controversy over sexual orientation and gender identity or expression implicates broader public policy considerations best addressed by the Legislature. If these recently conceived and ever-contentious concepts are to find a place in our State's legal regime, that change should come through the Legislature rather than an amendment to the attorney ethical rules.

The Proposed Provision Reaches Beyond Any Ethical Rules Enacted in Any State.

The State Bar attempts to characterize its proposal as a lockstep measure with the ethical rules of other States. But that is not an accurate depiction of the

legal landscape. To begin with, in Appendix "C" of its Petition, the State Bar cites the ethical codes of 23 other States (plus the District of Columbia), so even if all those jurisdictions had enacted the proposed provision (which, as discussed below, is inaccurate), the fact remains that even by the State Bar's calculations, the majority of States have not embraced anything like the current proposal.

Digging a bit deeper, we determined that the ethical codes in eight of the 24 other jurisdictions cited by the State Bar—Connecticut, Delaware, the District of Columbia, Idaho, South Carolina, South Dakota, Tennessee, and Utah—have a somewhat similar set-up to that which currently exists in our State, in the sense that those jurisdiction's rules contain "sexual orientation" as an enumerated suspect classification in the *comments* rather than the rule itself, which is precisely what our rules already do.

Delving further still, we found that *none* of the 24 other jurisdictions cited in Appendix "C" contains "gender identity" or "gender expression" in either the rules or the comments. In this sense, Arizona's rules, which contain "gender identity" (but not expression) in Comment 3 to ER 8.4, Rule 42, are already an aberration, and the State Bar's petition seeks to widen the chasm between our State and others. Again, for the reasons expressed above, some of us are troubled by this and other aspects of Comment 3 to ER 8.4, Rule 42, and we are thus considering whether to propose a different amendment to that comment.

The State Bar Admits that No Need Exists for the Proposed Provision.

In light of all the concerns we have discussed herein, one might suppose that a great countervailing need exists for this troublesome proposal. But that is not the situation here. The State Bar has not even alleged, much less demonstrated, a need for the proposed measure. Indeed, it does not appear that a complaint has ever been filed invoking Comment 3 to ER 8.4, Rule 42, (or any

similar comment or rule in any other State). In essence, the petition is best characterized as a problematic "solution" to a non-problem.

In sum, a simple balance of the relevant interests readily shows the proper course for resolving the State Bar's pending petition. On the one side, we have highlighted hosts of constitutional and policy concerns with the proposed provision, and on the other side, the State Bar has not shown any need for that measure. Hence, the scale weighs decidedly against the State Bar's petition.

CONCLUSION

For the foregoing reasons, the undersigned concerned attorneys oppose the State Bar's proposed amendments to the Arizona Rules of the Supreme Court. I have been authorized by the attorneys listed below to assert their support, in their individual capacity as Arizona licensed attorneys for this petition; the exigent circumstances precluded obtaining physical signatures.

Respectfully submitted this 15th day of July, 2011.

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